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Supreme Court of the United States,

October Term, 1897.

FRANKLIN SUGAR REFINING COMPANY, Libelant-Appellant, AGAINST The Steamship SILVIA, Claimaint-Appellee.	No. 79.

BRIEF FOR THE SILVIA.

STATEMENT.

This cause was brought into this Court by a writ of *certiorari*, issued November 19, 1895 (p. 57), to review a final decree of the United States Circuit Court of Appeals for the Second Circuit, entered June 5, 1895, (p. 57), which affirmed a final decree of the District Court for the Southern District of New York, dismissing the libel, with costs (p. 50).

The libel was filed to recover damages to a consignment of 13,227 bags of centrifugal sugar on a voyage of the Silvia from Matanzas to Philadelphia in February, 1894.

The *Silvia* is an iron ship of 1,104 tons net register, built in Newcastle, England, about 1884. She was classed in Lloyds 100 A1. Her length is 225 feet; beam, 34 feet; depth of hold, about 28 feet. She was a first class ship in

every respect (p. 5), was maintained in the best of navigable condition, and on this voyage was not wanting in any respect (p. 11). She was in command of Captain Joseph Clark, a shipmaster of sixteen years' experience (p. 5). He had served in five other steamers (p. 7).

The libel alleges that the goods were carried under and pursuant to the terms of a bill of lading, issued by the master, reciting the shipment of the sugar in good order and condition, and providing for its delivery in like good order and condition at Philadelphia, the "dangers of the seas only excepted," unto the order of the American Sugar Refining Company, or to their assigns (pp. 1, 2). The libel makes no reference to any charter-party or other shipping document.

The bill of lading was substantially in the form alleged (p. 46).

The allegation of fault on the part of the vessel was as follows (p. 1):

"Said damage was caused by the failure of the owners of said vessel to exercise due diligence to make said vessel in all respects seaworthy, and to the failure of said vessel and those in charge of said vessel to take proper care of the cargo, especially in that they did not properly secure the sidelights of said vessel and allowed said vessel to go to sea with one of her sidelights improperly closed, or with no proper shutter fitted thereto, and after the said glass had been broken, instead of using due diligence in repairing said sidelight, allowed the same to admit sea water, to the damage of said cargo, and in other faults which the libelant will show at the trial of this cause."

These charges were denied in the answer, which further alleged (*a*) that the losses were by a danger of the sea, (*b*) were within the exemptions provided by the third section of an act relating to navigation of vessels, bills of lading, &c., approved February 13, 1893 (Harter Act).

The damage complained of resulted from the inflow of sea water through a broken side port into the No. 1 between-decks, which was fitted up as a steerage (Barrett, p. 42). It then drained down into the lower holds, where it overflowed the bilges, wetting and injuring the sugar.

The steerage compartment was in No. 1 between-deck, and was fitted with four round ports on each side, eleven feet above the water line as the vessel was trimmed on that voyage (p. 19). The ports were eight inches in diameter, constructed in the usual way, and when closed and secured were watertight. A five-eighths inch glass was set in a brass frame hinged to the ship's side, and which swung inwards on a horizontal plane. The glass ports were protected on the inside by iron dummies, blinds, or dead-lights, hinged at the top, which were also watertight. When closed and secured these dummies would make the ship's side watertight even if a glass port were broken.

A line of similar ports extended from the steerage to the stern of the ship, on each side, opening into all the between-deck compartments, and there were similar ports on the same level in the forecastle as well as in the cabin aft.

No passengers were carried in the steerage on the voyage from Matanzas to Philadelphia, part of the spare tackle, gear and some ship's stores were in the compartment. There was ready access to the steerage from the main deck by means of a stairway down the No. 1 hatchway. It was apparently expected that some of the officers or crew would be in the steerage for ship's purposes from time to time during the voyage. There was no cargo in the compartment, and hence the officers, on sailing, though careful to see that the glass ports were closed and secured, did not close the iron dummies or dead-lights.

The blinds could have been closed when the ship left Matanzas, but they were left open by design. "We "wanted to go down there at any time for stores, oils, "lights, and so on" (Clark, p. 14). "We had to have "light going down about our stores" (Nicolson, p. 29). "There was perfectly easy access to that steerage at all "times during this voyage" (Clark, p. 14). "It only took "a couple of minutes to open the hatch and go down" (Nicolson, p. 30).

The ship sailed from Matanzas on February 16, at 6 A. M. The material events of the day are set forth in the Protest, as follows (pp. 47, 48):

"10 A. M. Strong breeze, with heavy head sea, ship laboring and pitching heavily and shipping heavy water

over all. At 3 P. M. second engineer reported water draining through bulkhead doors into stoke hole. Called all hands and took off No. 1 and 2 hatches, and found that the sea had broken the glass in the forward port on starboard side of the steerage, which port was located near the bluff of the bow. The frame was securely fastened, but glass gone. * * * On the previous day, when making ready for sea, an examination was made of all ports, and same found in good order and secure. It was also found that the sea broke one of the ventilator flanges about the same time when the broken port was found, also funnel flanges for forecastle. February 17th: Same weather 1 A. M. No. 2 tarpaulin damaged by seas. At 4 A. M. gale slightly moderating, but still shipping heavy seas and pitching badly."

The weather is described to the same effect in the evidence of the witnesses (Clark, pp. 9, 11, 19; Nicholson, p. 25; Shotell, p. 36).

Immediately upon discovery that the glass port was broken the iron dummy provided for the protection of that porthole was closed (p. 36). It made the porthole watertight (p. 7). No further water entered during the voyage (p. 18).

In the District Court it was held (1) that the officers were negligent in omitting to close the iron cover of the port prior to sailing, with the hatch leading to that compartment battened down; (2) that the ship was unseaworthy for the voyage with the dummies open; but (3) this was due to no want of due diligence of the owner, but was a fault in management of the ship, and that the exemption provided by the third section of the Harter Act applied and relieved the ship (64 Fed. Rep., 607).

Judge Brown stated his conclusions as follows:

"In supplying the usual iron covers, the owners had 'used due diligence to make the ship seaworthy' as regards these ports, and had fulfilled their obligations in this regard under the Act of February 13, 1893, so as to bring themselves within its protection. Although the ship sailed from Matanzas in an unseaworthy condition, from the fact that the hatches were battened down without the closing of the iron coverings of the port below,

that was not the owner's fault. The duty to close the iron covers to prevent the breakage of the glass and the ingress of sea water, was a duty appertaining exclusively to the 'management of the vessel,' which devolved upon the officers of the ship, and the omission to close them was a 'fault or error in the management of the vessel,' within the language of the act. The omission was a fault of precisely the same nature as the omission to put on hatch covers would have been in a rough sea. *By the supply of proper ports, proper glasses and proper iron covers for the ports*, as in the supply of proper hatch covers, *the owner's duty of 'due diligence' was fulfilled;* and if the officers of the ship, either at the moment of sailing or afterwards, omit to make use of the things supplied to put or keep the ship in a proper seaworthy condition for meeting the perils of the seas from time to time, such an omission seems to me purely a fault 'in the navigation or management of the vessel,' for which the owner is not responsible under the recent act."

In the Court of Appeals it was held that the ship was not unseaworthy, because the glass ports were plainly a sufficient protection to the cargo for ordinary weather, and there was ready access to the steerage for the purpose of closing the dummies if neccessary on the approach of a storm, and that the omission to close the dummies, if a fault at all, which was doubted, was a fault in the management of the ship, and hence was within the exemption provided by the statute (35 U. S. App., 395).

The substance of the decision in the Court of Appeals was stated by Wallace, Circuit Judge (Rec., pp. 53, 54), as follows:

"We are of the opinion that the steamship was not unseaworthy when she began her voyage. Granting that the glass covers were not a sufficient protection for the ports in rough weather, they were adequate for fair weather, and it would have been but the work of a few moments to unbatten the hatch of the compartment, and close them with the iron covers. In the state of the weather during the first few hours of the voyage, there was no necessity for closing the ports with the iron covers, none even for closing them with the glass covers, and it can hardly be imagined that a storm would be encountered without premonitions affording ample time for ac-

cess to the compartment, and for fastening the iron covers. The case of Steel *v.* Steamship Co., 3 App. Cas., 72, is quite in point. In that case a cargo of wheat was damaged by sea water entering a port about a foot above the water line, owing to the insufficiency of the fastenings. The special finding of the jury did not state whether the insufficient fastening of the port happened before starting on the voyage or afterwards. The bill of lading contained the usual negligence exemptions, which were sustained in the Court below, where judgment was given for the defendants. On appeal it was held that the judgment must be reversed, and the cause remanded for a specific finding as to whether the port was insufficiently fastened when the steamer sailed, and, if so, whether the cargo was so stowed, with reference to the port, that it could not be readily closed on short notice, on the approach of storm. Lord Blackburn expressd the opinion that if the port was in a place where it would be, in practice, left open from time to time, but was capable of being speedily shut if occasion required, the vessel could not be said to be unfit to encounter the perils of the voyage; that if, when bad weather threatened, it was not shut, that would be negligence of the crew, and not unseaworthiness of the ship.

If the steamship was seaworthy, she was nevertheless liable for the loss, notwithstanding the exception against dangers of the seas in the bill of lading, if those in charge of her navigation were negligent in not causing the port to be sufficiently secured after the steamship got out to sea, unless the Act of Congress relieved her. Whether they were justified in supposing that there could be any reasonable apprehension of risk from a port so small and so high above the water line as this, protected as it was by a glass cover of such thickness, is a question of fact, in respect to which different minds might differ. Assuming, however, that they were not, and that they were negligent in not putting on the iron cover, we think the case is controlled by the Act of Congress, and that its provisions relieve the steamship from liability." * * *

(p. 54): "It has also always been the law that the exemption of the dangers of the seas in the bill of lading or other contract of affreightment does not exonerate the shipowner from responsibility for injury to the goods which results from a breach of his implied obligation to provide a seaworthy vessel. Thus the carrier was responsible for a loss produced by the dangers of the sea if it was one which would not have happened, except for the concurrence of some unknown and undiscoverable defect in the equipment of the vessel, which defect, because

it was not discoverable, could not be remedied. In the place of this responsibility the Act of Congress substitutes a less stringent one by declaring that if the owner shall exercise 'due diligence' to make the vessel in all respects seaworthy, neither he nor the vessel is to be responsible for damages or loss in transporting merchandise, resulting from "faults or errors in her navigation or management," nor for losses arising from dangers of the sea. Other sections of the act emphasize the meaning of the particular section. Sections 1 and 2 prohibit carriers from relieving themselves by contract from the obligation of exercising 'due diligence to make their vessels seaworthy,' or from liability for loss or damage to cargo arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery; that it does not prohibit them from displacing by contract the warranty of seaworthiness, or their responsibility as insurers of cargo. Read as a whole, the purpose of the act manifestly is, on the one hand, in the interests of the public, to prevent carriers from evading responsibility to exercise due diligence in providing seaworthy vessels, and in the handling and care of the cargo; and on the other hand, whenever they have exercised due diligence in these respects, to absolve them from liability for losses arising during the transit from the perils of the sea, and from faults or errors in the navigation or management of vessels" (p. 55).

From the final decree of the Court of Appeals, entered pursuant to the foregoing decision, the libelant sued out this writ.

POINTS.

I.

The Evolution of the Harter Act.

The history of the various conferences between the representatives of cargo underwriters, shipowners and ship underwriters, held, for the most part, under the auspices

of the Society for the Reform and Codification of the Law of Nations, at intervals from 1865, to 1887, shows that it was impossible to arrive at a model form of contract of affreightment which continued to be satisfactory to the different interests for any considerable period. A full account of those conferences, and the results, will be found in *Wendt's Maritime Legislation* (3d Ed.), Chap. II., pp. 295–511, dealing with "The International Law of Affreightment in Connection with the Attempts to Agree on Uniformity in the Wording of Bills of Lading." Very little aid in the construction of our statute will be derived from an examination of the different forms of documents agreed upon at the various sessions of the association. Each session was dissatisfied with the proceedings of the former meetings; Congress seems to have been dissatisfied with them all.

Mr. Harter's act, as introduced in the House of Representatives in 1892, was very obviously based upon an act introduced in the House of Representatives at the instance of the New York Chamber of Commerce, and passed by the House February 3, 1885 (Wendt, pp. 403, 404). This bill was passed about six months before the Hamburg Rules, to which the appellant makes reference as the probable origin of the statute (Wendt, pp. 430, 442). There was nothing in the act passed by the House in 1885, nor in the Hamburg Rules, which corresponded with Section 3 of Mr. Harter's act. That section appears to have been original with him or with the cargo underwriters for whom he acted,

The second section, which he took from the third section of the proposed act of 1885, was modified by him so as to be more stringent, by changing the provision defining the shipowner's obligation with regard to seaworthiness, as a duty "*in every way and manner within their, his or her power* to render said vessel seaworthy and capable of performing her intended voyage," and substituting for it an obligation to make said vessel seaworthy, &c. A warranty was substituted for diligence.

These changes are shown in the subjoined parallel:

PROPOSED ACT OF 1885.

SECTION 3. That it shall not be lawful for any such vessel, her owners, master, agent or manager, to insert in any bill of lading any clause, covenant, or agreement whereby the obligations of the owners of said vessel to properly equip, man, provision, and outfit such vessel, and in every way and manner within their, his, or her power to render said vessel seaworthy and capable of performing her intended voyage, shall in any wise be lessened, weakened, or avoided; and all provisions and clauses contained in any bill of lading issued by any such public carrier relieving from liability the vessel, her owners, or master for their or his neglect, or for any improper condition of the vessel, shall be null and void and of no effect in law.

HARTER'S HOUSE BILL.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or any covenant or agreement whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

In the Senate, Mr. Harter's proposed second section was changed by the introduction of a clause making the definition of the obligation in regard to seaworthiness read that the owner was "*to exercise due diligence*" to make the ship seaworthy.

The Senate's changes in this section, which were concurred in by the House, are shown below:

HOUSE BILL.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading, or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy, and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

AS AMENDED.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.

The third section of Mr. Harter's act, which finds no counterpart in any of the model documents referred to by Dr. Wendt, and the changes in it that were made by Senate amendments, finally concurred in by the House, are shown below:

HOUSE BILL.

SEC. 3. That if any vessel transporting merchandise or property *between* ports of the United States of America *and foreign ports* shall, *on starting on her voyage*, be in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel. *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, *the vessel*, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

AS AMENDED.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or *charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel*, her owner or owners, charterers, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

Whatever Mr. Harter's object may have been in introducing the bill, it is plain from an examination of its course through Congress, and of the changes made in it before its final passage, that it embodies a compromise between the different commercial interests, represented on one side by cargo and its underwriters, and on the other, by the ship and its underwriters.

In view of this fact not much light is thrown upon it by reference to the "evil to be remedied," except in so far as that evil is indicated by the phraseology of the different sections. From this it appears there were evils on both sides. Speaking generally, the language of the statute

shows that the cargo interests desired to prevent exemptions from improper stowage, care and custody of the cargoes at ports of shipment and ports of delivery, and in the matter of delivery at the port of destination. The vessel interests desired relief especially from liabilities from latent defects (The Glenfruin, 10 P. D., 103), and from faults or errors in navigation or in the management of the ship and her appliances, where the owner personally had exercised due diligence in providing a structurally fit and adequate ship for the service. The Harter Act represents a compromise reached on substantially those lines.

The act as introduced by Mr. Harter, and as finally passed, will be found in the appendix (pp. 49, 50, 51).

There seems to be no serious question that the third section of the statute, at least, applies to vessels transporting merchandise to ports in the United States from foreign ports. That section provides:

"That if the owner of any vessel transporting merchandise or property *to or from* any port in the United States shall exercise due diligence, &c., neither the vessel, her owner or owners, agent or charterer shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel," &c.

It has been decided in a number of the lower courts, in analogy to the decisions under prior acts relating to navigation, that the exemptions provided by the third section are available to foreign vessels (*The Elona*, 64 Fed., 880, 882; 38 U. S. App., 50; *The Silvia*, 35 U. S. App., 395; *The Strathairly*, 124 U. S., 555; *The Scotland*, 105 U. S., 24, 30; *The State of Virginia*, 60 Fed., 1018; *Thomassen* v. *Whitwell*, 12 Fed., 891; *In re Leonard*, 14 Fed., 53; *Levinson* v. *Oceanic Steam Nav. Co.*, 15 *Fed. Cas.*, 442).

II.

The ship was seaworthy on sailing from Matanzas, with the glass port closed and secured, though the dummy or deadlight inside was not shut. There was ready access to the steerage, so that the dummy could be closed, if necessary, at a moment's notice on the approach of storm.

(**a**.) The ship was structurally fit in all respects. Her master testified:

"She is built of iron; classed in Lloyd's 100 A 1—a first-class ship in every respect (p. 5).

"Q. In what sort of general navigable condition was this vessel maintained by the owners? A. First class.

Q. Was she wanting in any respect, so far as you know? A. No, sir."

Libelant produced no evidence, nor does the record suggest that the vessel was not properly equipped or lacking in any needful appliances.

(**b**.) She was supplied with the usual kind of ports, which were sound, fit and sufficient when used. No question arises, except with regard to a single port in the steerage.

The port that broke was the forward one of a row of four or five on the starboard side of the ship in the No. 1 between-decks, which was fitted as a steerage. It was about thirty feet from the bow, where the side of the ship was straight, and about eleven feet from the water line. It was an eight inch port. The glass, five-eighths of an inch thick, was put in the brass frame from the outside, and held in the frame by a brass rim that screwed in. The frame and the glass were in perfect condition. It was supplied with the usual blind or dummy, which was also in order, and when closed made the hole water-tight, even without the glass port (pp. 9, 28, 36).

It seems that this port had been cut in the ship's side and fitted about three months before this voyage (Nichol-

son, p. 30). After it was fitted, the vessel made the following voyages: (1) from London to St. Johns, under command of Captain Nicholson (p. 30); (2) from St. Johns, where Captain Clark took command of her, to Pilley's Island; (3) from Pilley's Island around to St. Johns; (4) from St. Johns to Halifax; (5) from Halifax to New York; (6) from New York to Philadelphia; (7) from Philadelphia to Tucacas, Venezuela (p. 20); (8) from Tucacas to Puerto Cabello; (9) from Puerto Cabello to Matanzas, where she loaded libelant's cargo (p. 19).

The metallic fittings of the port and the glass were sound and in all respects fit (p. 34). There was no injury or damage to the metallic part of the port in the accident that broke the glass. The carpenter, Shotell, testified (p. 36):

"Describe the appearance of the port when you went in the steerage after it was broken? A. The rim was fast, the port was secured, and there was simply a few fragments of glass in the frame."

(P. 38): "Q. Was the frame injured in any way, the frame of the port? A. No, sir; the frame was perfectly tight.

"Q. Was it screwed up? A. Yes, the same as it had been."

(**c**.) The glass port was closed and secured in the usual way before sailing on the voyage.

The ship sailed from Matanzas on the morning of February 16th. On the previous afternoon the captain directed the chief officer to see that the ports in the steerage were closed and secured (pp. 12, 13). The mate testifies that he received those orders (pp. 23, 24) and instructed the carpenter accordingly (pp. 24, 31). The carpenter admits having received the instructions (pp. 35, 37). He accordingly went into the steerage and closed and secured all the ports with his own hands (pp. 35, 38). He testifies positively that the port which afterwards broke was properly closed and screwed up (p. 35). The mate went down into the steerage after the carpenter had finished, examined the ports himself, and found them all closed and fastened (p. 24). The captain on returning to the ship from the shore, late in the afternoon, rowed around the ship in his

boat. He also testified positively the ports in the steerage were closed and appeared to be fastened (p. 6).

(**d**.) The dummies were designedly left open on sailing to afford light in the steerage. It was expected the officers and crew would be going in there for ship's purposes during the voyage.

It had not been usual to close the dummies in the steerage during any of the time that the witnesses who were examined had been with the ship, a period of at least three years (pp. 8, 23, 33), though no passengers had been carried there (p. 33). In the judgment of the officers the glass ports were sufficient to keep out the water, and the iron covers had been left open apparently to afford light for the compartment. The mate was asked about this on cross-examination:

"By Mr. Burlingham: Q. Now, you did not need any light in the steerage on that vessel, did you? A. We had to have light going down about our stores" (p. 29).

Some of the ship's lines, stores, oils, lights (p. 14), spare gearing (p. 22), sails (p. 39) and hauling lines (p. 21) were in this compartment; and it was evidently expected that persons would be going into the steerage from time to time. This was testified by the captain in his cross-examination (p. 14):

"Q. Was there anything the matter with the dummy on the inside of that port light? A. Not that I am aware of.

Q. Could it have been shut when you left Matanzas just as well as after you discovered it? A. Yes.

Q. No particular reason for leaving it open? A. Yes. *We wanted to go down there at any time for* stores, oils, lights, and so on."

The evidence of the mate, to which the libelant refers (Brief, p. 8), is not in contradiction of the foregoing testimony, that it was expected persons would be going in and out of the steerage during the voyage, but merely shows that the spare gear they had there was not such as would probably be required in the course of an ordinary voyage.

It does not show that the stores, oils, or lights (p. 14) would not be required.

(**e**.) There was free and ready access to the steerage at all times during the voyage.

All that was required was merely to unbatten one corner of the hatch, the work of a few moments.

The appellant argues (Brief, p. 7) that the Court of Appeals was wrong in finding to this effect, intimating that battening down the hatches is a complicated matter, which the Court of Appeals, from its supposed want of experience in admiralty cases, did not properly appreciate. But this was not left to inference.

Libelant's counsel himself proved, on the cross-examination of the ship's officers, what battening down means, and that, when battened down, the hatch could be opened so as to provide access to the steerage in two minutes.

On the subject of battening down, Captain Clark testified (p. 21):

"By Mr. Burlingham: Q. What do you mean by battening down? A. In battening down, we put tarpaulins on the hatch, put the battens in and drive the wedges in; that is the way a hatch is battened down in all cases."

Touching the question of ready access to the steerage, the master testified (p. 14):

By Mr. Burlingham: "Q. You had cargo in this so-called steerage? A. No.

Q. Nothing in it? A. No.

Q. What is it for? A. Steerage passengers.

Q. What was it used for on this occasion? A. We had some lines, a little stores and one thing and another there.

Q. *Do you mean that there was perfectly easy access to that steerage at all times during this voyage?* A. *Yes.*

Q. Nothing to prevent a man from seeing whether anything had happened to those ports by going down there into the steerage? A. Nothing in the world to hinder him from seeing all around. * * *

Q. No particular reason for leaving it open, was there? A. Yes. We wanted to go down there at any time for stores, oils, lights and so on."

Chief officer Nicholson testified to the same effect (p. 30):

By Mr. Burlingham: "Q. *How long does it take you to get it open and go down?* Two minutes? A. *A couple of minutes, I suppose. Perhaps do it in less in extra pressure. Only a matter of knocking three or four wedges out.*"

(f.) On the facts of the case the ship was seaworthy at the time of sailing.

The finding of the Court of Appeals was as follows (p. 53):

"We are of the opinion that the steamship was not unseaworthy when she began her voyage. Granting that the glass covers were not a sufficient protection for the ports in rough weather, they were adequate for fair weather, and it would have been but the work of a few moments to unbatten the hatch of the compartment and close them with the iron covers. In the state of the weather during the first few hours of the voyage there was no necessity for closing the ports with the iron covers, none even for closing them with the glass covers; and it can hardly be imagined that a storm would be encountered without premonitions affording ample time for access to the compartment and for fastening the iron covers."

The facts fully establish the correctness of these conclusions. The Court rightly determined from them that the ship was not unseaworthy on sailing (The *Titania*, 19 Fed., 101, 107; *Steele* v. *The State Line*, 3 App. Cas, 72, 82, 90; *Hedley* v. *Pinkney & Sons S. S. Co.*, 1894 App. Cas., 222, 226-8; *Gilroy* v. *Price*, 1893 App, 56, 64; The *Mexican Prince*, 82 Fed., 484.

Steele v. *State Line*, 3 App. Cas., 72, was the case of a cargo of wheat, shipped at New York for Glasgow, and damaged by sea water entering through a cargo port, *about a foot* above the water line, which was insufficiently fastened. The special finding of the jury did not state whether the insufficient fastening of the port happened before starting on the voyage or afterwards. The bill of lading contained the usual negligence exemptions, which were sustained in the Court below, where judgment was given for the defendants. On appeal the judgment was reversed, and the cause remanded for a specific finding as

to whether the port was insufficiently fastened when the steamer sailed, and, if so, whether the cargo was so stowed with reference to the port, that it could or could not be readily closed on short notice, on the approach of storm. Lord Cairns, *L. C.* (p. 82), said:

"On the occasion of that new trial it appears to me that it will be the duty of the learned Judge who conducts it to obtain from the jury an expression of opinion as to whether the ship, at the time she left New York, was seaworthy in the sense in which I have used the term; of course in arriving at that conclusion the precise and accurate consideration of the state of this port will become very material. *It may * * * be that the port, if open when she left New York, was not occasioning any danger to the ship whatever, so long as calm or moderate weather prevailed*, and *it may be that the port was so circumstanced that, upon any approaching change of weather, it might immediately have been closed and fastened down;* or it may be, on the other hand, that the cargo was so loaded that, the fastenings of the port being from the inside, those fastenings were covered over by the cargo, and rendered inaccessible, or rendered, at any event, inaccessible without such a removal or change of the cargo as would occupy a considerable time, and could not conveniently take place when the ship was at sea."

On this point Lord Blackburn (p. 90) said:

"Now, my lords, I cannot see that this special verdict finds, either one way or the other, whether or no there was a want of seaworthiness or reasonable fitness to encounter the ordinary perils of the voyage or not. I think that is left quite ambiguous and uncertain. I quite agree with what has been said, that it was a question of fact for the jury, whether or no the vessel was made reasonably fit to encounter these ordinary perils.

I think also that there are some views of the case in which, though it would still be a question of fact for the jury, there could not be much doubt about it one way or the other. If, for example, this port was left unfastened, so that when any ordinary weather came on, and the sea washed as high as the port, it would be sure to give way and the water come in, unless something more was done —if in the inside the wheat had been piled up so high against and covered it, so that none would ever see whether it had been left so or not, and so that if it had been found or thought of, it would have required a great

deal of time and trouble (time above all) to remove the cargo to get at it and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. *I think, on the other hand, if this port had been*, as a port in the cabin or some other place would be, open, and when they were sailing out under the lee of the shore remaining open, but *quite capable of being shut at a moment's notice, as soon as the sea became in the least degree rough, and in case a regular storm came on, capable of being closed with a dead light—in such a case as that no one could, with any prospect of success, ask any reasonable people, whether they were jury or judges, to say that that made the vessel unfit to encounter the perils of the voyage*, because that thing could be set right in a few minutes, and there is always some warning before a storm comes on, so that they would have plenty of time to put it all right, and it would have been put right. *If they did not put it right after such a warning, that would be negligence on the part of the crew and not unseaworthiness of the ship.*"

In *Hedley* v. *Pinkney & Sons S. S. Co., Ltd.* [1894], App. Cas., a ship was sent to sea with stanchions and rails on board, but not shipped as they ought to have been, so as to raise the bulwarks at a certain part the proper height. A storm came on, and a seaman engaged in performing his duty on deck fell overboard, in consequence of the neglect to ship the stanchions and rails, and was drowned. The Court found it was not safe for the crew that the ship should leave port with the stanchions and rails unshipped. The plaintiff claimed the defendant was liable for a breach of its duty, under the Merchant Shipping Act, 1876, S. 5, which provides:

"In any contract of service, expressed or implied, between an owner of a ship and the master, or any seaman thereof, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master shall use all reasonable means to ensure seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her

in a seaworthy condition for the voyage during the same" (39 & 40 Vict., C. 40, S. 5).

The House of Lords held that the neglect of duty on the part of the master did not render the ship unseaworthy, within the meaning of the act. Lord Herschell, *L. C.* (whose judgment was concurred in by Lord Watson and Lord Macnaghten (pp. 226-8) said:

"The question is, Was there evidence that this obligation had not been fulfilled? It is asserted on the part of the appellant that there was, on the ground that the apertures, which should have been closed by fixing the stanchions and rails, were left unclosed; that the vessel was consequently, at the time of the accident, unseaworthy; and that the master, having failed to see that the stanchions and rails were fixed, had not used all reasonable means to keep 'her seaworthy for the voyage during the same.'

"My Lords, the case mainly turns, in my opinion, on the construction to be put upon the words 'seaworthy for the voyage' in the connection in which they are found.

"The word 'seaworthy' is a well-known term in shipping law, and has a perfectly definite and ascertained meaning. It is used to describe the condition in which a vessel insured under a voyage policy is bound to be on leaving port if the contract of insurance is to be effectual against the underwriter.

"Baron Parke, in the case of *Dixon* v. *Sadler* (5 M. & W., 405, 414), defined the seaworth ness of a vessel thus: 'that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter ordinary perils of the voyage.' Other definitions which have been given do not, I think, substantially differ from this, and I think when so well known a word is used in the statute of 1876, it must have its well established meaning attached to it.

"The question is then, was the vessel unseaworthy in this sense at the time of the accident? It must be admitted that there was more danger to those engaged on board than if the moveable bulwark had been in its place; but did this render the vessel unseaworthy?

"In the case of *Steele* v. *State Line Steamship Company* (3 App. Cas., 72), which came before your Lordships' House, the question arose whether a vessel which started on her voyage with an insufficiently fastened porthole, through which the sea burst, damaging the cargo, was in a seaworthy condition at the commencement of her

voyage. Lord Blackburn expressed the opinion that if the port was in a place where it would be in practice left open from time to time, but was capable of being speedily shut if occasion required, the vessel could not be said to be unfit to encounter the perils of the voyage; that if when bad weather threatened it was not shut, that would be negligence of the crew and not unseaworthiness of the ship.

"My Lords, I entirely concur in this view. It is quite clear that if this view be correct, the *Prodano* was not unseaworthy at the time she left the port of London. After she left that port, her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped. The fault was in not making use of the equipment with which she had been furnished.

"Under circumstances such as these, I do not think it can be said that there has been a failure to keep her in a seaworthy condition for the voyage within the meaning of the enactment. Following, as it does, the obligation that the owner and the master, and every agent charged with the loading of the ship or the preparing thereof for sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage, I think the words 'to keep her in a seaworthy condition for the voyage during the same' point to an obligation of the same character, and not to a neglect properly to use the appliances on board a vessel well equipped and furnished. There is ample scope for the operation of the words in question, even though this construction be put upon the enactment. If any of the necessary appliances were lost or destroyed in the course of the voyage, it would, no doubt, be the duty of the master to use all reasonable means to supply others in their place, just as it might be his duty during the voyage to restore the hull or machinery, if damaged, to a condition suited to the perils to be encountered. But if the appellant's argument were to prevail, it would have a much wider scope than I am able to gather from the words of the enactment was intended by the Legislature.

"The failure properly to secure many parts of the ship which are in ordinary practice open, from time to time, would no doubt diminish the safety of those serving on board her, and be a source of danger to them; *but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed, the vessel thereupon became unseaworthy.*"

In *Hedley* v. *Pinkney & Sons*, 1892, 1 Q. B., 56, 65, Lord Esher had said (p. 65):

"It seems to me that these words of Lord Blackburn (the passage above quoted from the decision of Steel *v.* State Line), give an exact criterion whether the ship was seaworthy in the present case. The complaint must be that the ship was not properly equipped at the time of the accident, but the movable railing, which went on the top of the bulwark, was there, and was capable of being shipped; it was not denied that if it had been put in its place it was a sufficient security for the crew against ordinary risks of going overboard. It is exactly like the case described by Lord Blackburn, of the porthole left open, but which could be easily shut at any moment. The ship was in such a state, and so equipped, that, if the captain had done what it was his duty to do, when he saw a storm coming up, she could have been made safe in a moment. Under these circumstances, according to the illustration given by Lord Blackburn, the case is one of negligence on the part of the captain, not of unseaworthiness on the part of the ship. Therefore, in the ordinary sense of the term, this vessel was seaworthy."

A case somewhat resembling *Hedley* v. *Pinckney S. S. Co.* (*supra*) is that of *Quebec Steamship Co.* v. *Merchant*, 133 U. S., 375 where this Court reached a similar conclusion.

The appellant contends (*Brief*, p. 12) that this case is not in point because it deals with the liability of master to servant, whilst "the present case turns on the liability of a carrier to cargo, an entirely different relation." But, although the subject matter of the cases is different, the legal principle is identical in both.

The statute before the House of Lords in the English case provided that "all reasonable means to insure the seaworthiness of the ship for the voyage" should be adopted, while under the Harter Act, the obligation of the owner is "to exercise due diligence to make the ship seaworthy." The cases are therefore alike in two particulars: (1) at to what constitutes "due diligence" to make a ship seaworthy, and (2) what constitutes seaworthiness as a fact.

In *Gilroy* v. *Price*, 1893 A. C., cited by the appellant, the House of Lords decided merely that an exception from liability for any act, neglect or default whatsover of the master or crew, in the navigation of the ship "in the ordinary course of the voyage," did not relieve the ship from the state of unseaworthiness arising from the omission to case one of her water pipes which, without a case, was liable to be, and in fact was broken by pressure of cargo during the voyage.

In the course of his judgment, Lord Herschell, *L. C.*, observed (p. 64):

"I can understand cases in which a defect which constitutes unseaworthiness at the time of the disaster may have existed at the time when the vessel started, and yet it may have been a case not, properly speaking, of initial unseaworthiness, but of neglect or default in the prosecution of the voyage. If, for example, some porthole be left open, or there be some means of access for the water, which in the ordinary course of the prosecution of the voyage, if the master and crew were not negligent, would be put right, and it is usual to leave open when starting, there is no doubt that, although it existed at the time when the voyage commenced, it would properly be said not to be a case of unseaworthiness, but of 'neglect or default' on the part of the master or crew."

In the *Mexican Prince*, 82 Fed., 482, it was contended that a valve in a branch pipe line leading into one of the cargo compartments, was blocked open at the time of sailing by an obstruction, so that in the ordinary course of emptying one of the tanks during the voyage, water would flow into the hold through the open valve and cause damage to cargo. Brown, *J.* (p. 488), held:

"But even if the alleged obstruction of No. 3 valve existed in leaving Rio, that would not constitute unseaworthiness, for, however it arose, the obstruction, if any, was accidental, of the most temporary character, and sure to be removed by suction upon the first test made with the pumps, and as well as the exercise of reasonable diligence on any special occasion calling for care during the voyage. * * * The cause of the damage, therefore, was negligence in the use of the means of safety provided by the owners, and a neglect to observe their written orders in

that regard, and not any omission by the owners to provide for all the requirements of a seaworthy ship and put her in seaworthy condition. In other words, the fault arose wholly in the management of the ship at the port of call and subsequent thereto; it arose during the voyage, and not from anything the owners did or omitted to do, or any lack of diligence by them to make the ship seaworthy at the commencement of the voyage. The third section of the Harter Act, therefore, exempts them from liability, so far as respects this negligence."

The only case cited by the appellant as opposed to the principles announced in the foregoing decisions is *Dobell* v. *Rossmore S. S. Co.*, 1895, 2 Q. B., 408. In that case the terms of the Harter Act had been incorporated in the bill of lading. Cargo was damaged during the voyage by sea water entering through a *cargo port*, which had been insecurely fastened, and was blocked in by cargo, so that it was inaccessible, and could not be secured during the voyage. The Court expressly declined to consider the Harter Act as a statute, but construed the third section merely as a printed exception in a bill of lading.

Lord Esher (at p. 413) said:

"They then introduced into their bill of lading the words of the Harter Act, *which I decline to consider as an act*, but which we must construe simply as words occurring in this bill of lading."

The Court then proceeded to decide that the insecure closing of a port prior to stowing cargo up against it, was not a fault in the management of the ship within an exception to that effect in the bill of lading. This is the gist of the decision.

Lord Esher quoted with approval (p. 415) the doctrine announced by Lord Blackburn, in *Steel* v. *State Line* (*supra*), "that if there was a porthole in a ship left unfastened and the cargo was stowed in such a way that it would take a considerable time to get at the porthole and fasten it, the ship would be unseaworthy; but that if it could be shut directly the necessity arose, the ship could not be said to be unseaworthy."

The Court of Appeals decision in *The Silvia*, was distinguished by counsel in the *Rossmore* case (p. 412), who said:

"The case in the United States Circuit Court of Appeals followed the decision in Steel *v.* State Line Co., and it is plain the port could have been got at and closed with the iron shutter, directly the necessity arose."

And Lord Esher, who had the decision of the Court of Appeals before him, evidently did not consider that the case was one of unseaworthiness, for he said (p. 414):

"In this view of the case, neither Carmichael *v.* Liverpool Co. (19 Q. B. D., 242), nor the decision in the case cited from the United States Circuit Court of Appeals have any bearing on the matter."

If *Dobell* v. *Rossmore Co.* be deemed good law, it is not in point for the appellant, nor in conflict with the preceding cases. The essential difference was that the cargo port was inaccessible, could not be secured during the voyage, and hence the insecurity amounted to unseaworthiness on sailing. In the other cases, and in this case, there was no real insecurity on sailing, and there was opportunity to take further precautions for safety during the voyage whenever the threatened approach of storm made it advisable to do so. The failure to take those precautions —a fault in the management of the ship's appliances—was therefore the proximate cause of the damage, and not unseaworthiness.

III.

That the loss was within the exception of "dangers of the sea" contained in the bill of lading.

(**1**.) It was a sea peril loss.

The damage was caused by sea water, which entered the steerage through the broken port and drained through the wooden bulkhead into No. 2 between-decks and down on the cargo in lower No. 2 hold. The port was in a sound and safe condition when the ship sailed, and was properly secured (pp. 24, 35, 36, 88). It was broken whilst the vessel was at sea during rough weather (pp. 9, 15, 19, 20, 24). A loss happening under these circumstances is *prima facie* a loss by a danger of the sea (The *G. R. Booth*, 64 Fed., 878, 879; *Hibernia Ins. Co.* v. *St. Louis Transp. Co.*, 120 U. S., 166; *Carruthers* v. *Sydebotham*, 4 M. & S., 77; *Laurie* v. *Douglass*, 15 M. & W., 745; *Davidson* v. *Bernaud*, L. R., 4 C. P., 117; The *Southgate* [1893], Prob., p. 29; The *Xantho*, 12 App. Cas., 503, 508, 513; *Hamilton* v. *Pandorf*, 12 App. Cas., 518, 522-5).

In *Hamilton* v. *Pandorf*, 12 App. Cas., 518, 525, where sea water was let into a ship by a hole which rats had gnawed in a lead pipe, causing damage to cargo, it was claimed that the loss was not within an exception of "dangers and accidents of the sea." Lord Watson (at p. 525) *put the case of water entering an insecurely fastened port as an illustration of such a loss.* He said:

"If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which, in that case, is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, *or where one of the crew leaves a porthole open*, through which the sea

enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

"Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression 'dangers and accidents of the sea' different from that which it bears in a contract insuring cargo against sea risk; that, in a case of a charter-party or bill of lading, the Court ought to look to what has bean termed the remote, as distinguished from the proximate, cause of damage, whereas, in the case of a policy, the proximate case can alone be regarded. The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound by the implied terms of his contract to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible."

In the same case (p. 513) Lord Bramwell said:

"It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say: 'I have paid for a loss by perils of the sea, and claim on you because the loss was not by a peril of the sea.'"

Appellant contends that the loss should not be regarded as by a danger of the sea, because the weather was not "extraordinary." Plainly, it was a gale; whether it was "extraordinary" or not depends largely on the mental habits or modes of expression of the witness. Seamen will always *understate* the severity of a storm. It is doubtful, however, whether the distinction between ordinary and extraordinary gales is important (The *Centurion*, 68 Fed., 382, 385, 386). The Court there said:

"This storm appears, both from the account given at the time, before the extent of damage to the cargo was known, and from the effect upon the vessel itself, to have been sufficiently severe and violent to create the injury to

cargo, although sufficiently chocked and fastened to resist storms which might reasonably be anticipated,"

and hence found the loss was by a peril of the sea.

Here appellant argues that the glass broke in a moderate gale, and that, therefore, the loss was not by a danger of the sea.

But this argument will work both ways. It may be said that the port was sufficiently strong to resist all ordinary seas, and that the fact that it broke proves that something extraordinary occurred.

The vessel had traded for at least three years (p. 36), with the line of ports on the same level, extending from stem to stem (p. 6), and none, as far as appears, had ever before been broken (pp. 36, 25, 9, 21, 22). In practice, the dead lights had never been closed, except in the cargo compartments, where the the glass was liable to injury, either from the inside or from being damaged by lighters, and experience had shown that the glasses in the ports that far above the water line were strong enough to withstand the pressure of the heaviest seas (pp. 7, 8, 22, 23, 25, 36). Neither the captain, a master mariner of fourteen years' experience (p. 5), nor the chief officer, who also held a master's certificate and had been in command (p. 30), ever heard of ports similarly situated being stove in by the sea (pp. 21, 22, 23). In the judgment of the officers the sea had not broken this port, but a floating bit of wreckage (pp. 25, 9). This judgment was confirmed by the fact that at the time the steamer was in the worst of the storm, was heading directly into it (p. 9); the blinds on the forecastle ports, at the same level, and situated on the bluff of the bow, where the heaviest blows would be received from the seas breaking against and over the bows, were not closed, yet none of the glasses was broken.

If any inference is to be derived from these facts, it is that a blow was received on the side port by something floating on the surface of the waves, and that the loss was from one of the unknown perils peculiar to the sea.

If the port, always theretofore unprotected by the blind, had withstood more severe storms, the in-

ference would be that something besides water broke it on this occasion. Whilst, if the storm was more severe than any it had previously withstood, the extraordinary severity should be considered a peril within the exception (The *Exe*, 14 U. S. App., 626).

(2.) The libelant failed to prove such negligence on the part of the officers as would deprive the ship of the benefit of the exception.

The loss being *prima facie* by a danger of the sea, and hence within the exception the burden of proof was upon the libelant to defeat its operation (The *Hindoustan*, 35 U. S., App., 173; *Clark* v. *Barnwell*, 12 How., 272, 280; *The Victory and the Plymothian*, 168 U. S., 410, 423; *Transportation Co.* v. *Downer*, 11 Wall., 129; *Railroad Co.* v. *Reeves*, 10 Wall., 176, 189, 190).

The proof offered by the claimant showed that in spaces other than cargo compartments, at this level of the water, it was not usual or customary to close the deadlights; and in their long prior experience no accident had befallen the glasses. The ports in the steerage on this voyage had been managed in the usual and customary way. The only witness libelant called on the subject was one of the admiralty surveyors of Philadelphia, a former shipmaster, who was asked this single question: "Q. Do you know anything about the custom of shutting those dummies at sea? A. Yes, sir. They are always shut *in the cargo space*" (p. 43). They were shut in the *cargo* spaces on this voyage. But the question was as to the custom relating to those in *non*-cargo spaces. As to those, the libelant's expert did not contradict the testimony furnished by the claimant.

Libelant furnishes no evidence, but relies wholly on the event as proof of neglience. True the dummy was there and if used would have prevented damage. But the real question is, was the master as a careful officer reasonably bound, under the circumstances, to use it?

"Where the master of the ship takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, his own-

ers are not held responsible, because he may have omitted some possible precaution which the event suggests that he might have resorted to" (Montague E. Smith, *J.*, in The *William Lindsay*, 5 P. C., 338, 343; see, also, The *Victory*, 168 U. S., at p. 424).

Judge Brown's finding, that the failure to close the dummies was negligence, was based upon the conclusion that the ports were inaccessible owing to the hatches being battered down (p. 49). This was a subject little discussed in the District Court, and the evidence of ready access to the ports by unbattening a corner of the hatch, a work of two minutes or less (p. 30), was not pressed upon his attention. The Court of Appeals finding as a fact that there was ready access to the steerage and to the ports there, said (p. 54):

"Whether they" [the officers] "were justified in supposing that there could be any reasonable apprehension of risk from a port so small and so high above the water line as this, protected, as it was, by a glass cover of such thickness, is a question of fact in respect to which different minds might differ."

Accepting the proposition that "different minds might differ" as to whether this was negligence, libelant is brought face to face with a difficulty arising from the burden of proof. For, if the loss may as well have occurred by a peril of the sea as by negligence, the libelant cannot recover (*Clark* v. *Barnwell*, 12 How., 272, 280; *Muddle* v. *Stride*, 9 C. & P., 380, 383; the *R. D. Bibber*, 8 U. S. App., 42, 47; *Searles* v. *M. Ry. Co.*, 101 N. Y., 661).

(**3**.) If there was any negligence contributory to the loss, it was a "fault in navigation or in the management of the ship" within the 3d section of the Harter Act.

Prior to the passage of this statute it was held that the carrier could not have the benefit of an exception which *prima facie* covered the loss, where negligence on the part of his servants contributed in any way to the damage. The 3d section of the statute, however, has not only changed the public policy which was behind that rule

adopted by the Court, but has changed the law itself; so that in any case to which the provisions of the Harter Act apply, the fact that a loss may have been contributed to by negligence of the carrier's servants, in connection with the navigation of the ship, or the management of her various appliances, is no longer ground for defeating the exception.

IV.

If the vessel be deemed to have been unseaworthy when she broke ground on the voyage, nevertheless the shipowner "exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied"

(**1**.) The structural fitness of the ship was proved, and is unquestionable.

The evidence leaves no room for doubt that in her general structure the ship was not only *reasonably* fit, but was as perfect as a cargo vessel well could be. The admiralty surveyor of Philadelphia, who was called by the libelant to survey the ship and the cargo, was unable to say a word against the structural sufficiency of the ship. No claim has been made heretofore that she was defective or deficient in any of her appliances. In the appellant's brief (p. 21) there are some *obiter* remarks concerning the proof of diligence by shipowners in other cases; but they are without bearing on the present controversy, since this ship, as a vehicle for carrying cargo, was unquestionably fit in every respect.

(**2**.) The steamer was manned by competent officers and crew.

Captain Clark, who is a master mariner of fourteen years' experience (p. 5), though he had served but a few months in the *Silvia*, had been in five different steamers in his experience (p. 5). The chief officer was also a master mariner and had previously been in command of

this vessel (p. 30). The carpenter, Shotell, the only other witness who had to do with this port, had been going to sea for seventeen years, and had been carpenter of the *Silvia* for three years (pp. 36, 38). A presumption of competency arises under these circumstances (*Butler* v. *Boston Steamship Co.*, 130 U. S., 527, 554; *Pickup* v. *Ins. Co.*, 3 Q. B. D., 594). But no question concerning their general competency arises. Failure to close the ports was at most an error of judgment, which the law may declare amounted to negligence. The ports were left open by design, and the mate, Mr. Nicholson, testified that, if he had had the least suspicion that a glass port was liable to be stove in by the sea, he would "have ordered them to be closed, and have it understood that they were closed" (p. 22).

(**3**.) The steamer was equipped, with proper ports, which, if used, would have made the port watertight against all possible contingencies.

The proof shows that the particular port that broke was supplied with a dead-light, which hung above it, ready to be closed (p. 7), and that after the glass was broken it was closed, and made the hole water tight (p. 18).

(**4**.) Due diligence was, in fact, exercised by those on board the steamer in closing the port.

On the day prior to sailing, the captain ordered the chief officer to see that the ports in the steerage were properly secured (p. 12); and the mate acknowledges receiving that order, and states that he directed the carpenter accordingly (pp. 23, 24). The carpenter admits that the mate told him to close the ports, and says that he went into the steerage, and, with his own hands, closed and fastened them all by *screwing* up the nuts (p. 35). He testifies positively that the one that broke out was properly secured. After he had finished, the mate himself went into the steerage and personally examined all the parts with his hands, finding them properly secured. There can be no doubt that the glass port in question was secured, since the evidence shows that it was the *glass* alone that broke. After the accident the brass rim remained firmly

in its place, properly screwed up, and was uninjured (p. 36).

The officers in charge of the vessel, competent and experienced men, acting under the usual practice, and exercising an honest judgment that the glass port was sufficient, left the dead-light open. Under those circumstances, is it to be said that they did not exercise due diligence in the matter of closing the ports? Due diligence calls merely for ordinary care, for the discharge of their duty in connection with the port in accordance with the practice of reasonably prudent and careful men similarly situated. It does not call for the highest care, although, undoubtedly, that (by closing the blind) would have avoided the damage. The evidence of the ship's witnesses is clearly that of experienced and competent persons. They say they acted in accordance with the usual custom in securing the steerage ports in the way they did; and although the libelant called an expert, apparently with the view of contradicting them, their evidence is in fact uncontradicted. In these circumstances, the finding should be, as we submit, that due diligence was exercised in the manner of closing the steerage port.

V.

The Harter Act exempts shipowners from responsibility for faults in the management of the ship's appliances, the ordinary use and control of which are committed to the officers and crew, even though such mismanagement may occur prior to sailing and may leave the ship unseaworthy.

(**1.**) Whatever may have been the purpose of the other sections of this statute, it is not to be doubted that the third section was designed to effect some limitation upon the pre-existing liability of ships and shipowners. This has been recognized in the Supreme Court, in the *Delaware*, 161 U. S., 459, 471, where Mr. Justice Brown said:

"It is entirely clear, however, that the whole object of the act is to *modify* the relations previously existing between the vessel and her cargo. This is apparent, not only from the title of the Act, but from its general tenor andi provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibt contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair and outfit of the vessel, and the care and delivery of the cargo."

The views of the lower courts on this subject have been quoted fully in the preceding statement (*ante*, pp. 4–7).

In the *Colima*, 82 Fed., 665, 678, Brown, *J.*, speaking of the intent of the act to modify the former warranty of seaworthiness, said:

"The context and the pre existing law indicate that the *intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact*, and to substitute for that warranty a warranty only of [due] diligence to make the ship seaworthy."

The appellant (*Brief*, p. 11) says this is not so because under the 2d section the owner's obligation as to seaworthiness is still defined in terms of warranty. The argument is based on the omission of the word "to" between the words "diligence" and "properly equip, &c.

This carping criticism of the work of an engrossing clerk cannot change the plain sense of the section. The word "to" was in it as originally introduced (see *Appendix*, p. 49–51); it was in the Statute of 1885, as passed by the House of Representatives on February 3, 1885 (Wendt, Maritime Legislation, 3d Ed., pp. 403, 405), from which this section was taken; it was in the rule proposed by the Hamburg Chamber of Commerce (Wendt Mar. Leg., p. 435), to which libelant alludes as the possible parent of the act; and it was in that rule as modified and adopted by the Association for the Reform and Codification of the Law of Nations (p. 42), at their meeting in Hamburg, August, 1885 (p. 430). It seems evident that the omission of the word "to" was a mere clerical error in transcribing the amendment introduced in the Senate. But even

without the word "to," the section plainly shows that the shipowner's obligation in this respect was merely the exercise of due diligence and not that of warranty.

Now that the warranty of seaworthiness no longer exists, it is not strictly material to inquire whether the ship actually was seaworthy on sailing or not; the real inquiry must be: Was due diligence exercised by the owner to make her seaworthy? The fact that Congress refused to enact a warranty of seaworthiness in the 2d and 3d section, as proposed in Mr. Harter's house bill, tends of itself to show that the division of risks and liabilities made by the statute, was not intended to be marked *by any period of time*—as, *e. g.*, of the sailing of the ship—but rather by the nature of the things to be done to make the ship fit for an ordinary voyage, without causing damage to the cargo.

(**2**.) The object of the statute, as shown by its different sections, was to require due diligence by the owner in *providing* a seaworthy ship for use, and to relieve him from the faults of his servants, to whom her ordinary use is committed.

The first and second sections of the statute indirectly impose a liability upon the shipowners (*a*) for damages which may result from faults in stowage, custody, care or delivery of the cargoes, and (*b*) for liabilities arising from the failure to exercise due diligence to make the ship seaworthy, &c.; for they provide that the introduction of clauses relieving the owner from damage arising from those causes shall be unlawful, and such clauses, if introduced, shall be declared void.

It is noticeable that, in a broad sense, all of those implied duties are such as would ordinarily be performed by a shipowner through forces engaged by him from the shore. The stowage of cargoes would be done by stevedores. The care and custody of the cargo would be left to receiving clerks, wharf clerks, watchmen and other servants of this class, at the port of shipment. The delivery of the cargo would be made by similar servants at the port of destination. Similarly, the work of

making the ship structurally seaworthy, and of manning and outfitting her, would be performed by the owner's shore servants. Over all of these classes of servants, the owner could exercise an immediate supervision, if he so desired. Or he could select such persons of responsibility to perform the services as would be able to respond to him for any liability to which the ship might be subjected through their neglect. These would be fair reasons for allowing the liability for default in such matters to rest upon the shipowner.

The instances in which the District Court has held the shipowner liable for failure to exercise due diligence to make the ship seaworthy (The *Mary L. Peters*, 68 Fed., 919; The *Flamborough*, 69 Fed., 470; The *Alvena*, 74 Fed., 252) were cases where there had been a want of due diligence in providing a structurally fit ship for use by those to whom her use was committed.

But defaults in respect of the matters indicated, are not the sole risks to which goods are liable, in over-sea carriage. A structurally sound and perfect ship may be unfit to start on a voyage, or may at a later stage become unfit to continue it without risk of injuring cargo, owing to the neglect of those to whom the use and operation of the numerous and varied appliances of a modern steamship are necessarily committed. Many of these appliances are provided by an owner, not for a fixed use, but for varied uses. They require manipulation and management. The management may be required before the ship sails, during her passage or after arrival at destination: but in a broad sense, it would be during the voyage in either case (The *Carron Park*, 15 P. D., 203; The *Mexican Prince*, 82 Fed., 484; The *Glenochil* [1896] Prob., 10). At whose risk, under the statute, are losses arising from such faults?

Now that the shipowner is relieved from the warranty of seaworthiness and the warranty of due diligence is substituted in its place, it would seem to be immaterial whether a specific act of mismanagement, which results in damage, occurs before sailing or afterwards, except as it may bear on the extent or scope of the diligence which the statute requires the owner of the vessel to exercise. Does that diligence extend to all matters, even of naviga-

tion and management, until the vessel sails, and does the act exempt the shipowner from faults in management only when they occur afterwards? Is the mismanagement of one of the ship's appliances, just prior to sailing, to be held a default in the exercise of diligence by the owner, and the same act or neglect when occurring on the voyage, to be deemed a fault in management? Or, should the test be to inquire whether the act complained of belongs to navigation or to the management of the vessel (irrespective of the time it occurs), or whether it falls within the class or kind of duties and obligations, exclusive of management, which are to be performed by the owner?

The latter seems to be the true test.

(**3**.) What is included in "faults in *navigation?*"

To *navigate* means "to direct *or manage* a ship" (*Cent. Dict.*).

Faults *in navigation* are not limited to neglect in shaping the ship's course as the appellant contends. In England it has been held that leaving open a sea cock (*Good* v. *London Assn.*, L. R., 6 C. P., 563), or leaving a cargo port insufficiently fastened on sailing (*Carmichael* v. *Liverpool Assn.*, 19 Q. B. D., 242), or omitting to have the rudder fastened with a proper pin, are matters of "*improper navigation*," and improper navigation in the ordinary sense of those words (per Lord ESHER in *Canada* v. *British Assn.*, 23 Q. B. D., 342, 343; The *Xantho*, 12 App. Cas., 503, 513).

It is suggested that some different meaning has been ascribed to the words "*improper navigation*" in the cases above referred to (which arose under policies), than that which they have when found in a bill of lading or in a statute.

The same suggestion was made to the Court of Appeal in England, in *Canada Shipping Co.* v. *British Association*, 23 *Q. B. D.*, 342, but Lord Esher, in answer to it, said (p. 343):

"I do not think that in the case of *Carmichael* v. *Liverpool, &c.*, 19 *Q. B. D.*, 242, the Court held that what happened there was not improper navigation in the ordi-

nary sense of the term, but gave the word *navigation* a meaning other than its *ordinary* meaning. If they had done so I think it would have been a very wrong decision. It appears to me from the paraphrase there given that the word *navigation* accurately expressed the *ordinary meaning of the word.* It was there said that *if there was negligence on the part of the shipowner or his servants before the navigation of the ship commenced*, which had the effect of causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, that would make the navigation improper navigation. *The ship was only sent to sea in such a condition that she could not be safely navigated with regard to the safety of the cargo, and therefore she was in fact improperly navigated.*"

In the *Warkworth*, 9 *P. D.*, 145, which arose under a statute, 148, Bowen, *L. J.*, said:

"A person who uses his ship which is not in a condidition to be so employed, does in reality improperly *navigate* her."

Under the rule stated in the foregoing cases the failure to use the iron dummy, if a fault at all, would be a "fault in navigation" within the exemption.

(4.) The exemption from faults "in the management of said vessel" is even wider in scope.

Mismanagement of the appurtenances or appliances of the ship *at sea* would be a fault or error in navigation (*Carver, Carriage by Sea*, S. 26, *note* Z).

When, therefore, the statute exempted the ship and her owners, not only from faults or errors of "navigation," but also added "*or* in the *management*" of the vessel, it undoubtedly meant to include acts other than those pertaining to navigation in its strictest sense. Amongst such faults those that most readily occur to the mind relate to such faults in the management of the ship's appurtenances or appliances as would leave her in an unfit state to be navigated with safety to the cargo. It is fair to presume, therefore, that such acts were intended to be covered by the exemption of faults or errors in "management."

That such was the intent of the statute was held in both

the lower courts in the present case (*ante*, pp. 4, 5) and has been decided in others (The *Sandfield*, 74 Fed., 371; The *Mexican Prince*, 82 Fed., 484).

In the *Glenochil*, 1896 Prob., 10, 15, President Jeune in construing this word of the statute, said:

"It is clear that it was intended by S. 3 to exempt from liability for damage or loss resulting from faults and errors of navigation, or in the management of the vessel, and the way in which those two provisions [S. 1 and S. 3] may be reconciled, is, I think, first, that the act prevents exemptions in the case of direct want of care in respect of the cargo, and consequently the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel, and not with the cargo * * * (p. 16). I do not say whether navigation, in the strict sense of the term, is limited to the period during which the vessel is sailing, that is to say, in motion, *but I see no reason for limiting the word 'management' to the period of the vessel being actually at sea.*"

In the same case Gorell Barnes, *J.*, said (p. 19):

"It seems to me that *all exceptions extend from the time that all the cargo was taken on board to the discharge*, though the terms of the exemptions themselves may not cover the particular act. For instance, if the navigation is said to cease at the time of arrival, the word does limit the time, but *there is nothing here to limit the time during which the word 'management' extends*, and it seems to me that it must extend, as the County Court Judge has said, up to the time that the cargo is finally delivered."

This decision overrules, in effect, the *dictum* of Kay, *L. J.*, in *Dobell* v. *Rossmore* (1895), 2 Q. B., 408, that the faults "in the management of the said vessel" referred to by the statute seemed to be "faults in managing *the sailing* of the vessel."

The actual decision in *Dobell* v. *Rossmore*, is irreconcilable with Judge Brown's decision herein (Rec. pp. 49, 50), and with the views in respect of the statute that he has expressed since the *Rossmore* case was published (*Botany Mills* v. *Knott*, 76 Fed., 582, 584).

To construe the word "management" as limited to nautical management, would be to deprive it of sub-

stantially all signification. The language of the statute is carefully chosen to avoid the notion that the word is of such limited application. It relieves the ship and owners from faults or errors in navigation *or* in *the* management. The alternative plainly suggests that acts in the management may be something different from faults in the navigation. Faults in nautical management would be faults in navigation under the first branch of the exemption, and would leave nothing for the word "management" to operate upon.

This argument for a limited construction was pressed upon the Court of Queen's Bench in *Baerselman* v. *Bailey* [1895], 2 Q. B., 301. The exception there was "any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship, *or otherwise*." The plaintiffs, owners of cargo damaged by bad stowage, contended that the words "or otherwise" referred to matters akin to navigation. Lord Esher, *M. R.* (p. 303), said:

"The assumed negligence of the stevedore was in disposing of the loading of the cargo before the ship sailed and consequently does not arise under the exceptions relating to negligence in navigation; but the question is whether it comes within the clause under the final words 'or otherwise.' The captain need not have employed a stevedore, though he was entitled to do so; but, under the circumstances, I think it must be taken that the stevedore was a servant of the shipowner. In the exception we do not find words of a class followed by general words. The general words do not indicate something resembling negligence in navigation; but to my mind they indicate something beyond and different to that, so that the clause relates to negligence in navigating the ship, and in matters other than navigating it, and *the question is not one of putting a limitation on the general words, but of reading them in their ordinary sense.*"

Rigby, *L. J.* (p. 305), said:

"Unquestionably, if in a clause in a bill of lading exempting a shipowner from liability there is an ambiguity, the document must be construed in favor of the shipper. That rule has no application where the document is free from ambiguity. We know what the history of these limitations has been. At first

the shipowner was freed from liability for the consequences of the negligence of the master and mariners in navigating the ship. Then the exemption from liability was applied to acts of the other servants, which would include stevedores employed by the captain to stow the cargo, and then the words 'or otherwise' were added to the clause. It seems to me that there is no ground for imputing ambiguity to these words, which must therefore be construed according to their ordinary meaning. The clause exonerates the shipowner from liability for the negligence of his servants, whether in navigating the ship *or not*."

In the *Rotherfield*, 8 R. I. D. M., pp. 102, 104, the Marseilles Tribunal of Commerce, in construing an exception in an English bill of lading which exonerated a shipowner from responsibility for the faults of pilots, officers and crew in the "management or navigation of the ship," defined the word "management" as follows:

"The expression 'management' used by the parties should be interpreted in the sense which is especially attached to it in the language used by the parties in their contract. The tribunal has already had occasion to define the meaning of that expression. In the English language it has not the signification and the general scope which are attributed to it by the defendants. It refers only to the purely technical acts which the master has to perform, in that capacity, for the nautical direction to the ship, for all the manœuvering operations appertaining to her management (conduite) at sea, *in port*, or at anchorage, to the proper stowage of the merchandise for the stability of the ship, and to the ballasting, in a word, to all that concerns nautical art -that is to say, to the navigation, properly so-called, and to keeping the ship afloat (la bonne tenue à flot du navire). *It includes certain accessory operations, which, without being properly called navigation, enter into the precautions to be taken for the benefit* (intérêt) *of the ship, either in loading or discharging the merchandise.* It is to these things that the strict sense of the English word 'management' refers, which, by its origin, and even in its derivation, implies in reality a physical act done for the benefit of the ship (une action materielle appropriée exclusivement au navire). There is no room for doubt as to this, since the clause of the bill of lading applies the word 'management' without distinction to the pilots, officers and crew."

(5.) The "due diligence to make the ship seaworthy" required of the owner, does not extend to acts in the actual management of the ship's internal appliances. For faults in management he is expressly exempted, and the language is not such as necessarily to exclude from the exemption the faults of his servants in management prior to breaking ground for the voyage.

(A.) The context in which the owner's obligation is stated in the third section throws some light on the extent of it. The phrase is "that if the owner * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel nor the owner shall be held liable," &c. It is conceded that prior to the statute the owner's obligation with regard to manning and supplying the vessel was merely that of due diligence (*Earnmoor S. S. Co.* v. *Union Ins. Co*, 44 *Fed.*, 374). If he used due diligence in manning the ship he was not liable, though she might go to sea in an unseaworthy condition by reason of being in command of an incompetent or drunken navigator (*Earnmoor* v. *Union Ins. Co.* (*supra*). It was enough to exonerate the owner, that he exercised due diligence in performing the duty of selecting the master.

With the duty of the shipowner to exercise due diligence in manning the ship is linked the duty to exercise due diligence to make her seaworthy. These obligations are now made equal. There is no longer the duty to make her seaworthy in fact, but only to exercise due diligence to make her seaworthy.

That obligation should be taken as subject to the same limitation as the duty in regard to manning her. If he exercises such diligence as results in the provision of a structurally fit and perfect ship, performing all the duties in the matter of her outfit and equipment that would ordinarily be performed by a zealous owner or his shore representative, the obligation resting on him under the statute is fulfilled (*Silvia*, 64 Fed. 607; *Botany Mills* v. *Knott*, 76 Fed , 582, 584). Everybody knows an owner or his superintendent would not, in practice, go aboard a

ship to screw up her ports, or manipulate a valve, or perform any acts in the internal management of the ship's appliances. These are ordinarily committed to the control and management of the ship's officers or engineers. Congress evidently intended to recognize this course of business by limiting the owner's obligation to that of exercising diligence on *his* part in the provision of a structurally fit and proper vehicle for the transportation of cargo, exempting him from faults in the navigation of that vehicle, or in its management, by those to whom, in the ordinary routine of business, the navigation and management are committed, without determining by any point of time, but only by the nature of the acts, the things that are to be considered as navigation or management within the sense of the exemption.

This view is strongly confirmed by a number of negative circumstances.

(**B**.) In determining the intention of Congress it is permissible to regard the provisions which they have struck out of the bill as originally introduced as well as those which they have retained (*One Thousand Bags of Sugar*, 3 U. S. App., 366).

The provisions in the proposed bill that were struck out by amendment before its final passage indicate not only that the Congress did not intend to preserve the warranty of seaworthiness, but also that it did not mean to have the shipowner's obligations and his exemptions marked or determined by the point of time when a vessel should break ground for the voyage.

(**a**.) Both the 2nd and the 3d sections as originally proposed stated the owner's obligation as regards seaworthiness in the terms of warranty (*vid. Appendix*, pp. 49, 50). In the bill as passed the warranty was struck out of both sections, and there was substituted for it the provision that the owner should "exercise due diligence to make the vessel seaworthy."

(**b**.) The 3d section as proposed provided "that if any vessel transporting merchandize," &c., * * * "shall *on starting on her voyage be in all respects seaworthy*," &c., the vessel should be relieved, &c. In that section as passed, the time mark—"*on starting on her voyage*"—was stricken out. The obligation of the owner was measured by the exercise of due diligence to make the vessel seaworthy, in a general sense, *i. e.*, to *provide* a fit ship for use, without attaching to him the responsibilities that formerly followed the failure of the vessel to be, in fact, in all respects seaworthy "on starting on her voyage." It is significant that although the word "voyage" occurred twice in Mr. Harter's proposed third section, it does not appear at all in the third section as finally passed.

(**c**.) In the proposed bill it was provided that the exemptions from loss or damage resulting from error of judgment in navigation or in the management of the vessel should only be allowed if the vessel was "navigated with ordinary skill and care *from the time of her leaving her usual place of loading* on her intended voyage until her arrival," &c.

This qualification was wholly omitted in the section as passed, indicating that Congress intended the exemptions from faults or errors in navigation or in the management to apply, even though they might be committed *before* "the *time of her leaving her usual place of loading* on her intended voyage"; and to have the test relate to the *quality* of the acts, rather than the time when they were committed.

(**C**.) It is argued that faults in management prior to sailing, if serious, constitute a want of due diligence to make the ship seaworthy, and hence are imputable to the owner as a breach of his duty. This, however, is only another form of saying that the exemption from faults in navigation or in management relate only to such as occur during the voyage. It is to be observed in this connection that the owner's duty under the statute falls a good deal short of a warranty. Expressed in an-

other form, the obligation of the shipowner is to use ordinary care; that is, that degree of diligence or care which an ordinarily prudent, experienced and careful owner would exert in respect of his own affairs. A fair way of expressing this obligation would be to say that Congress intended to impose on him the same measure of care in providing a reasonably fit vehicle for the carriage of cargo that he would use in providing, outfitting and equipping an *uninsured* vessel of his own to carry his own uninsured cargo. In such a case it seems obvious that the owner personally or by his shore superintendent would be careful to see that the ship was in every way structurally fit for the voyage and equipped with all needful appliances for her own safety and that of her cargo. He would be careful in the employment of experienced navigators; but to them he would leave, as a practical matter within their more especial knowledge, and as a part of their most ordinary duties, the management of the ship's internal appliances and arrangements and the navigation of the ship. To the officers and crew would obviously be left the management of the pipes, valves, ports and hatches. Unless the Court should be of opinion that an owner under those circumstances would go down into a compartment of a vessel and with his own hands close and screw up the ports, or send a shore representative to do it, instead of leaving that to the officers, it seems impossible to say that the owner of the *Silvia*, by limiting the field of his activities to furnishing a structurally perfect ship, and leaving the management of her ports to her officers, failed, in the exercise of due diligence, to make the ship seaworthy, within the requirements of the 3d section of the statute.

It is suggested in the appellant's brief (p. 22) that the *Silvia* was the first decision on the Harter Act in a suit for damage to cargo, and that "the learned District Judge has since considered the act many times, and has adopted a much severer standard of diligence than that applied in this case, and has required far more stringent evidence thereof."

The cases referred to do not justify this state-

ment. All except the *Colima*, 82 Fed., 665, were cases in which the Court found as a fact that the vessels were *structurally defective*, and that the shipowner had not used due diligence in providing, as the vehicle of carriage, a reasonably fit vessel. There was no question in those cases of faults in management. The defects were structural. The faults were in respect of matters to which a diligent owner ordinarily gives attention in person or by his shore superintendents. The damages arose from those personal faults, notwithstanding proper "management."

The *Colima*, in as far as it involved the Harter Act, was a case of improper loading, of faulty distribution of weights in a vessel of tender model. She could not be relieved by the Harter Act from the consequen es of the disaster which overtook her, because the negligence in *stowage* was a matter for which the owner, under the 1st section of the statute, remained liable.

There is not the slightest reason for supposing that Judge Brown has changed in any way the views he expressed in his decision of the present case. On the contrary, in one of the most recent of his deci ions under the statute (*Botany Worsted Mills* v. *Knott*, 76 Fed., 582, 584, decided in October, 1896), he refers to his decision in this case as follows:

"The handling of the ship's appliances, with reference to the navigation or the safety of the ship for the purposes of the voyage, belong to the 'management of the ship.' Thus, in the *Silvia*, 64 Fed., 607, where the officers had neglected to close the iron shutters of a port hole, in consequence of which, in rough weather, sea water came in and damaged the cargo, it was held by this Court that the neglect arose in the 'management of the vessel,' was covered by the Harter Act, even though from the inaccessibility of the open port, as considered by this Court, the open port amounted to unseaworthiness; because the neglect consisted in not making use of the things supplied by the owner to put and keep the ship herself in a proper condition to meet stormy weather."

(**6**.) If, then, the proper test be to regard the quality of the negligent act rather than the time when it was com-

mitted; and if the intent of the act is to "relieve the shipowner from his previous warranty of absolute seaworthiness in fact" (82 Fed., 678), the real inquiry will be: Was the proper closing of the ports an act belonging to the management or navigation of the ship? That question it would seem, both on reason and on authority, should be answered in the affirmative. If it is so answered, then the ship is exempted, whether the fault in the management occurred prior to sailing (The *Carron Park*, 15 P. D., 203; *Carmichael* v. *Liverpool*, &c., 192 Q. B. D., 242; The *Silvia*, 64 Fed., 607; The *Warkworth*, 9 P. D., 20; do., 145) The *Southgate* (1893], Prob., 329), during the passage (The *Mexican Prince*, 82 Fed., 484; *The Sandfield*, 79 Fed., 371), or whilst unloading at the port of destination (The *Glenochil* [1896], Prob., 10; The *Castleventry*, 69 Fed., 475, *note*).

(7.) This construction is in accordance with the rule prevailing with regard to exceptions in bills of lading or charter parties which, by their terms, are sufficiently specific to relate to causes of damage occurring even before sailing, or where they import a modification of the implied warranty of seaworthiness formerly prevailing. (Baerselmen *v.* Bailey [1895], 2 Q. B., 301, 304).

Carver, Carriage by Sea, S. 58, states this rule as follows:

"When, however, a bill of lading has been given and taken, its provisions must be considered to relate back, and apply to what has been done in regard to the shipment before it was given It is to be taken as the expression of the contract under which everything has been done. Thus, the exceptions of risks contained in it apply to the stowage of the goods, although that may have been completed before the bill of lading was given (citing the *Duero*, L. R., 2 A. & E., 393; *Pyman* v. *Burt*, 1 Cab. & E., 207; *Norman* v. *Binnington*, 25 Q. B. D., 475, 478; *Nottebohn* v. *Richter*, 18 Q. B. D., 63)."

Other authorities holding to this effect are The *Carron Park*, 15 P. D., 203; *Scott* v. *Baltimore Steamboat Co.*, 19 Fed., 56; *Rubens* v. *Ludgate Hill S. S. Co.*, 20 N. Y. Supplement, 481; affirmed, 143 N. Y., 629; The *Carib Prince*, 63 Fed., 266; 35 U. S. App., 390; *Cargo Ex.*

Laertes, 12 Prob. Div., 187; The *Southgate* [1893], Prob., 329; *Pollock on Bills of Lading*, 39.

VI.

The libelant is not in privity with the charter-party between the owner and J. H. Winchester & Co.

The effort is made in the appellant's brief (p. 29) to show that, by a warranty of seaworthiness in a charter-party between the Red Cross Line, owners of the *Silvia*, and J. H. Winchester & Co., the claimant has precluded itself from any exemption under the Harter Act. It is contended by the claimant that the ship *was* seaworthy; but this point may be briefly noticed.

It is not shown in the evidence that the American Sugar Refining Company, consignee in the bill of lading, or the Franklin Sugar Refining Company, its assignee, were in any privity with this charter-party. It is not known for whom Winchester & Co. acted in effecting it, whether it was a speculation on the freight markets, or whether Winchester relet the vessel's freight space, or whether she was chartered for some unknown people who put her up as a general ship, nor does it appear whether the sugar belonged to the sugar refining company at the time of shipment, or whether it bought the cargo and took an assignment of the bill of lading. The facts are that the master issued a bill of lading in due form, reciting shipment of the cargo by Dubois & Co., providing for its delivery at Philadelphia unto the order of the American Sugar Refining Company or its assigns, he or they paying freight for the said sugar at the rate of (12c.) twelve cents U. S. currency per every one hundred pounds net invoice weight and all other conditions as per charter party. Dated New York, 31st January, 1891."

It has been repeatedly decided that a bill of lading in this form does not incorporate the exceptions or conditions of a charter-party, except such as are *ejusdem generis*

with the freight obligation (*Russell* v. *Niemann*, 17 C. B., U. S., 163; *Serraino* v. *Campbell* [1891], 1 Q. B., 283; *Taylor* v. *Perrin* [H. of L.], quoted by Lord Lopes in *Serraino* v. *Campbell* (*supra*), at p. 294).

If this clause of reference in a bill of lading will not bring in the exemptions of the charter party for the ship-owner's benefit, it could hardly incorporate a warranty, which might be for the cargo owner's benefit.

Further discussion of this point, however, is unnecessary, since, in the libel, libelant distinctly declared upon the bill of lading, alleging it was issued to the shipper by the master, and contained the agreement for the carriage and delivery of the cargo upon the terms therein stated (*Record*, p. 1). It was further alleged (p. 2) that the libelant had purchased the sugar in reliance upon the recitals of the bill of lading, that "the said bill of lading was duly assigned to the libelant, which became the owner of said cargo, and entitled to bring this suit."

No reference was made in the libel to the charter-party, nor to any other shipping document.

In these circumstances, libelant's rights are to be determined under the bill of lading (*Iron Mountain Railway* v. *Knight*, 122 U. S., 79; 92; *N. J. S. T. Nav. Co.* v. *Merchants Bank*, 6 Howard, 344.

Last Point.

The decree should be affirmed, with costs.

Dated New York, March 5, 1898.

Respectfully submitted,

CONVERS & KIRLIN,
Proctors for Appellee.

J. PARKER KIRLIN,
Advocate.

[2376R]

APPENDIX.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill.)

H. R. 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly

properly deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, *the vessel*, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or*

deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel*, her owner or owners, charterers, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be*

other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading, as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282, and 4283 of the Revised Statutes of the United States.

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

(Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147-149, 169.)

liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July,* eighteen hundred and *ninety-three.*

Passed the Senate as amended February, 1893, 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342.

Approved, February 13, 1893.

[2 Supp. R. S., p. 81.]